# UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

| SONY MUSIC | ENTERTAIN | MENT, et al., |
|------------|-----------|---------------|
|------------|-----------|---------------|

Plaintiffs,

v.

Case No. 1:18-cv-00950-LO-JFA

COX COMMUNICATIONS, INC., et al.,

Defendants.

COX'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO PRECLUDE CERTAIN EXPERT TESTIMONY BY DR. NICK FEAMSTER

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#### I. INTRODUCTION

Plaintiffs seek to exclude the testimony of Cox's expert, Dr. Nick Feamster, a highly-regarded Professor of Computer Science and the Director of Center for Data and Computing at the University of Chicago, under *Daubert* v. *Merrell Dow Pharms., Inc.,* 509 U.S. 579 (1993), and related authority. Yet, Plaintiffs have not raised any substantive critiques concerning the relevance or reliability of Dr. Feamster's opinions. And, beyond citing *Daubert* and related Federal Rules of Evidence, Plaintiffs have not applied the relevant standards to Dr. Feamster's analysis and conclusions. It is clear that Plaintiffs simply disagree with Dr. Feamster's conclusions, challenging the factual basis for Dr. Feamster's analysis, which is not the proper focus or standard for a *Daubert* inquiry. Plaintiffs' motion should consequently be denied. *See id.* 509 U.S. at 595 (1993).

Dr. Feamster applied his knowledge and expertise in computer science to reliably review the evidence produced in this case and proffer an opinion, thus meeting the standards set by the Federal Rules of Evidence. He is a renowned researcher, professor, and intellect and, is more than qualified to opine on the topics underlying his report. He is acutely familiar with the methodology required to perform this evidentiary analysis, having published numerous peer-reviewed publications covering the subject matter of his expert report in this case.<sup>1</sup>

In short, Dr. Feamster has the expertise and has completed the analysis necessary to assist the trier of fact grasp the concepts and better understand the evidence and data that the parties will present at trial. The fact that Plaintiffs disagree with Dr. Feamster's conclusions instead of the process by which he formed his opinion, is not a proper reason to exclude his testimony. *See Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 195 (4th Cir.), cert. denied, 138 S. Ct. 470, 199 L. Ed. 2d

<sup>&</sup>lt;sup>1</sup> See Declaration of Cesie C. Alvarez ("Alvarez Decl."), Ex. 1 (Dr. Feamster C.V.).

357 (2017) (noting that to perform a *Daubert* analysis "courts may not evaluate the expert witness' conclusion itself, but only the opinion's underlying methodology").

#### II. ARGUMENT

A. Dr. Feamster clearly identified the factual basis for his opinion concerning the absence of MarkMonitor downloads and reliably analyzed the download data.

MarkMonitor, whose "antipiracy" system Plaintiffs' used to detect instances of alleged infringement in this case, offered Plaintiffs' agent, the Recording Industry Association of America,

One such configuration, the one that MarkMonitor told Plaintiffs it would implement in this case, involved downloading the contents of an allegedly infringing file twice.

The

first download occurred when MarkMonitor downloaded the content of a file it encountered on a peer-to-peer network and sent it to third party, Audible Magic, for verification purposes.<sup>4</sup> Audible Magic would verify the work by confirming or disconfirming that the file was a copy of a work MarkMonitor was monitoring for Plaintiffs.<sup>5</sup> Parallel to this process, MarkMonitor would scan the peer-to-peer networks using metadata to locate peers sharing the work it was monitoring for Plaintiffs.<sup>6</sup> MarkMonitor represented that it would verify that the file the peer possessed was in-

<sup>&</sup>lt;sup>2</sup> See id., Ex. 7 (2012 Statement of Work, Bates No., RIAA00000017, Appendix C).

 $<sup>^{3}</sup>$  Id.

<sup>&</sup>lt;sup>4</sup> See Alvarez Decl., Ex. 9 (P2P Enforcement Process, MM0000189 at 10

<sup>&</sup>lt;sup>5</sup> See id.

<sup>&</sup>lt;sup>6</sup> See id. at 10-12.

deed a work it was monitoring by seeing if the peer had assigned to the file the same unique identifier – known as a "hash" – as the identifier for work as confirmed by Audible Magic. In addition to matching the hash of the peer's file with the hash of the work it was monitoring, who independently assessed MarkMonitor's system,

9 The fact that a piece of the allegedly infringing file was downloaded and verified was supposed to be memorialized in "evidence packages" that MarkMonitor created and maintained to confirm that an (allegedly) infringing file was found on a peer's computer. Where the peer in question was determined

to have an infringing file, and if the peer was operating at a Cox IP address, a notice alleging that

the peer was engaging in copyright infringement was prepared and sent to Cox. 11 This process of

See id. at 39:4-40:5, 41:22-42:20.

Slawomir Paszkowski, 35:17-36:5).

<sup>7</sup> To be clear, Plaintiffs are

see Alvarez Decl., Ex. 7 (2012 Statement of Work ("SOW"),
RIAA 00000017, at RIAA 00000026, 28).

Id. at RIAA00000028. MarkMonitor explained to RIAA

See id. at 10

see also, id. at 10-12, 23.

There are four peer-to-peer networks from which the allegedly infringing files were downloaded.

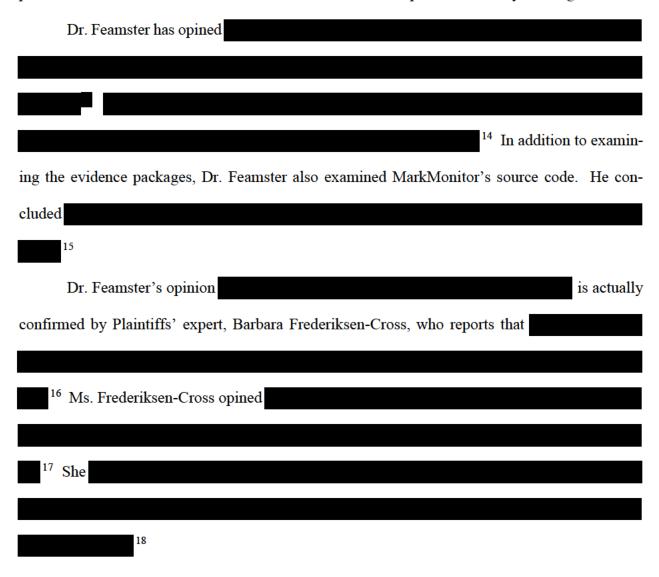
See Alvarez Decl., Ex. 5 (Deposition of

<sup>&</sup>lt;sup>9</sup> See Alvarez Decl., Ex. 9 (P2P Enforcement Process at 10, 13, 16, 18, 20); see also id., Ex. 8 (Stroz Friedberg Independent Assessment, RIAA\_00127769 at 777, 779, 780, 786).

<sup>&</sup>lt;sup>10</sup> See id.; see also Alvarez Del., Ex. 7, (2012 SOW, RIAA00000026, 28).

<sup>&</sup>lt;sup>11</sup> See Alvarez Decl., Ex. 9, (P2P Enforcement Process at 26-27).

downloading and verifying at least some of content found on a peer computer is similar to the verification process employed by Rightscorp in the *BMG* case, where the entirety of the file on the peer was downloaded and saved as authentication of what the peer was actually offering to share.<sup>12</sup>



<sup>&</sup>lt;sup>12</sup> See BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc., 149 F. Supp. 3d 634, 640 (E.D. Va. 2015), aff'd in part, rev'd in part, 881 F.3d 293 (4th Cir. 2018).

<sup>&</sup>lt;sup>13</sup> See Alvarez Decl. Ex. 2 (Rebuttal Expert Report of Dr. Nick Feamster, ¶¶ 22, 97-98, 102).

<sup>&</sup>lt;sup>14</sup> Id. at ¶ 99, bullet 1; see also Alvarez Decl., Ex. 4 (Deposition of Dr. Nick Feamster, 234:4-6

<sup>&</sup>lt;sup>15</sup> *See* Alvarez Decl., Ex. 2 (Feamster Rebuttal Rpt., ¶¶ 22-27; 128-142).

<sup>&</sup>lt;sup>16</sup> See Alvarez Decl., Ex. 3 (Expert Report of Plaintiffs' Expert Barbara Frederiksen-Cross, ¶ 81).

<sup>&</sup>lt;sup>17</sup> See id.

<sup>&</sup>lt;sup>18</sup> See id.

Plaintiffs seek to exclude Dr. Feamster's opinion concerning
on its weight, instead of challenging the reliability of his analysis and methodology.
However, "questions regarding the factual underpinnings of the expert witness' opinion affect the weight and credibility of the witness' assessment, not its admissibility." *See* Bresler, 855 F.3d at 195 (4th Cir. 2017) (finding that a disagreement based on the values the expert witness chose to conduct his analysis went to the weight and credibility of the expert's assessment, and not its admissibility); *see also Team 7, LLC v. Protective Solutions, Inc.*, 2010 WL 5348782 at \*3 (An objection to proffered expert testimony or report does not call for the trial judge's consideration of whether the proffered evidence is correct). Instead, pursuant to the court's "gatekeeping" role, Plaintiffs' focus should solely be on whether the testimony is reliable and can aid the finder of fact at trial. *See Team 7*, 2010 WL 5348782 at \*3.

Primarily, Plaintiffs attack Dr. Feamster's conclusion

by focusing on a straw man. Notably, Plaintiffs do not object to Dr. Feamster's

In fact, Dr. Feamster and Ms. Frederiksen-Cross, both analyzed the evidence packages, which was the evidence of alleged infringements MarkMonitor gathered

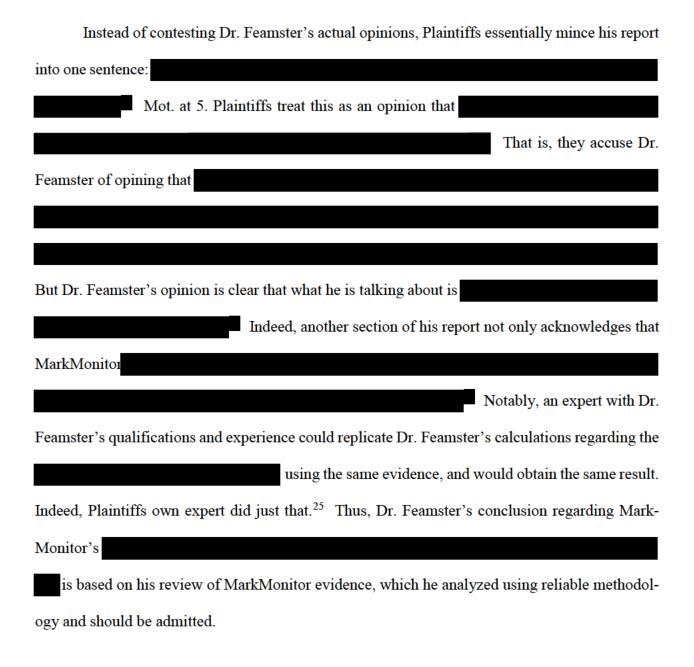
19 and MarkMonitor source code to form their individual opinions

20 Indeed, they agree about what the evidence packages show:

<sup>&</sup>lt;sup>19</sup> See Alvarez Decl., Ex. 3 (Frederiksen-Cross Rpt., ¶ 51). Notably, Ms. Federiksen-Cross

 $<sup>^{20}</sup>$  *Id.* at ¶ 94.

<sup>&</sup>lt;sup>21</sup> See Alvarez Decl., Ex. 10 (Deposition of Barbara Frederiksen-Cross, 45:21-46:11; 57:20-58:9).



<sup>&</sup>lt;sup>22</sup> See Alvarez Decl., Ex. 2 (Feamster Rpt., Executive Summary).

<sup>&</sup>lt;sup>23</sup> See Alvarez Decl., Ex. 4 (Deposition of Nick Feamster at 234:4-6, stating that his opinion was ee also id., Ex. 2 (Feamster Rpt., ¶¶ 22-27, 128-137).

<sup>&</sup>lt;sup>24</sup> See Alvarez Decl., Ex. 2, (Feamster Rpt., ¶¶ 32-35, 138-142).

<sup>&</sup>lt;sup>25</sup> See Alvarez Decl., Ex. 3 (Frederiksen-Cross Rpt., ¶¶ 81-82).

Dr. Feamster's conclusion is based "on a reliable foundation" and his testimony will help the jury understand what the evidence packages reveal about how MarkMonitor detected an alleged infringement and should thus be admitted. *Daubert v. Merrell Dow Pharms.*, *Inc.*, 509 U.S. 579, 584-587; Fed. R. Evid. 702(a) (expert testimony is only admissible if it "will help the trier of fact to understand the evidence or determine a fact in issue ...."). As such, his testimony concerning

## B. Dr. Feamster's expert opinion concerning MarkMonitor's use of Audible Magic is relevant, reliable, and admissible.

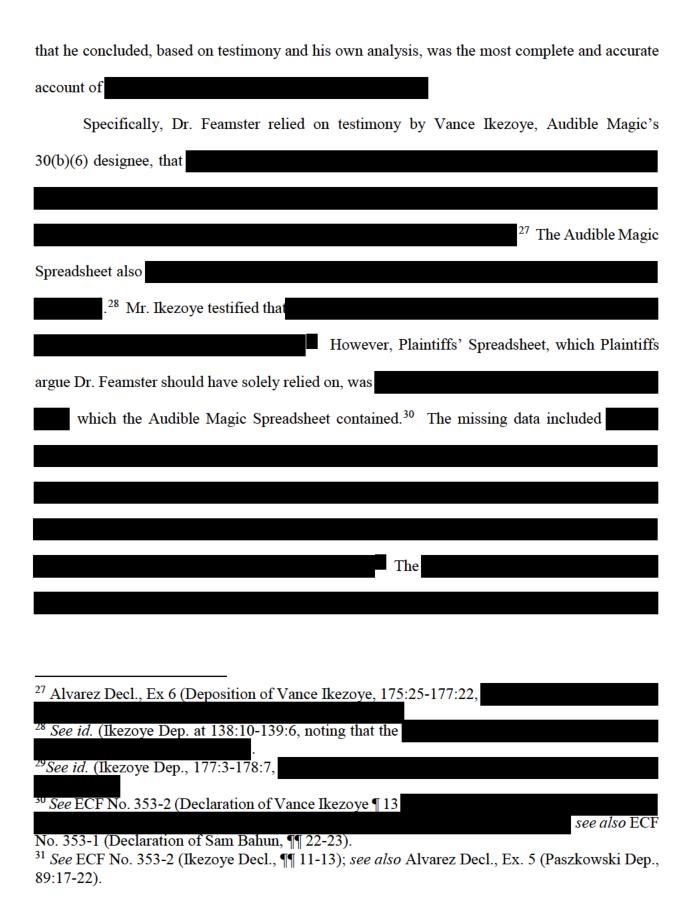
Plaintiffs claim that Dr. Feamster had "no factual basis" for his opinion concerning

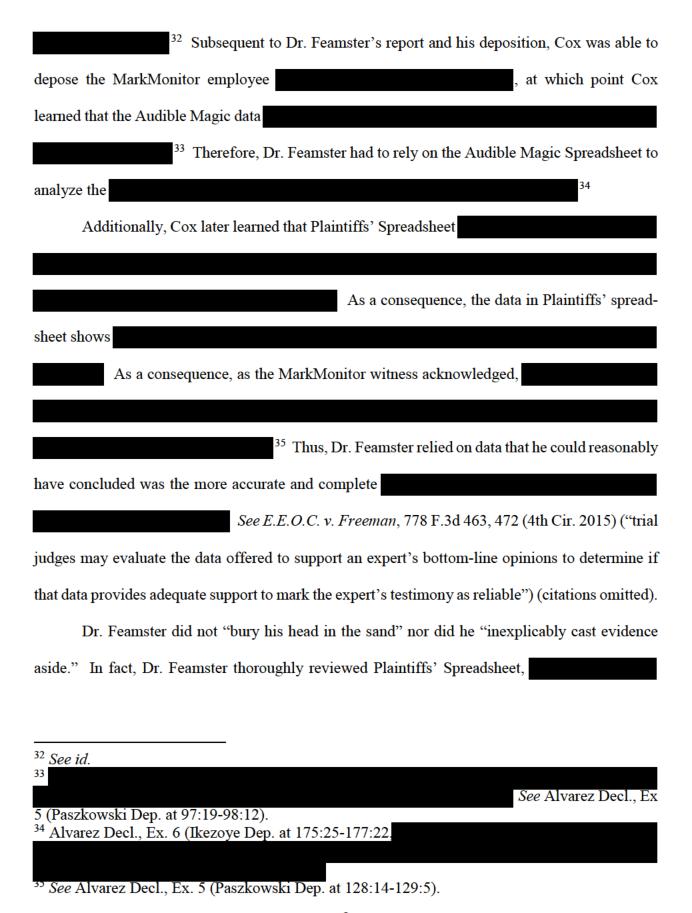
Plaintiffs are wrong,
and their argument is, at best, a factual dispute that does not raise issues with Dr. Feamster's methodology. The factual basis of an expert opinion "goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995); *accord Southland Sod Farms* v. *Stover Seed Co.*, 108 F.3d 1134, 1143 (9th Cir. 1997) ("Technical unreliability goes to the weight accorded a survey, not its admissibility") (citations omitted). The evidence and methodologies Dr. Feamster used to formulate his opinion about are detailed in his report and, under the law, his expert testimony is admissible.

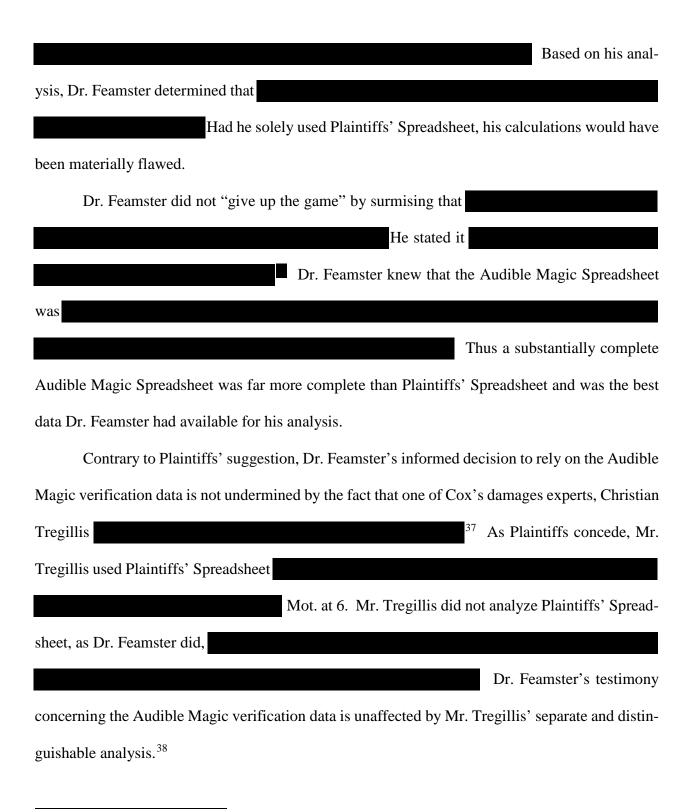
on a spreadsheet produced in discovery by Audible Magic, with Bates No. REV00003444 (the "Audible Magic Spreadsheet"). <sup>26</sup> He did not "refuse" any data presented as Plaintiffs suggest. Rather, Dr. Feamster used the data

Dr. Feamster clearly testified that

<sup>&</sup>lt;sup>26</sup> See Alvarez Decl., Ex. 4 (Feamster Dep., 349:3-10).



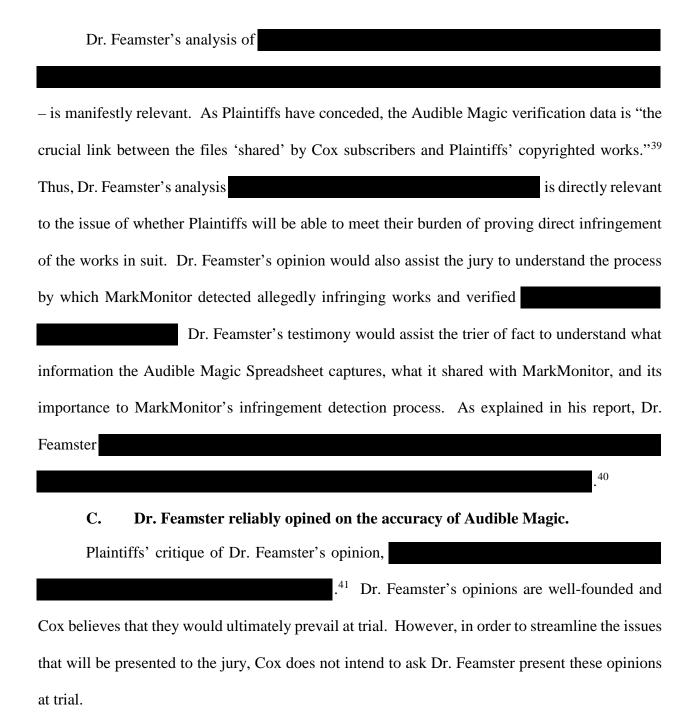




<sup>&</sup>lt;sup>36</sup> See Alvarez Decl., Ex. 2 (Feamster Rebuttal Rpt., ¶ 33).

<sup>&</sup>lt;sup>37</sup> For clarification purposes, Mr. Tregillis used Plaintiffs\_00286281 which is identical to Plaintiffs\_00286431, minus critical metadata.

<sup>&</sup>lt;sup>38</sup> How Plaintiffs' expert, Goerge P. McCabe, used Plaintiffs' Spreadsheet is irrelevant, especially considering that Plaintiffs concede it was used for a separate analysis and calculation.

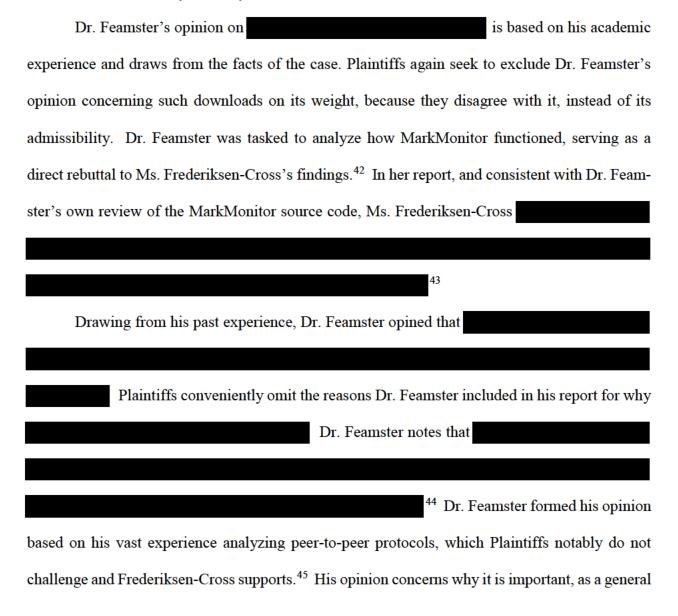


<sup>&</sup>lt;sup>39</sup> See ECF No. 353 (Plaintiffs' Motion in Opposition to Cox's Motion to Preclude Certain Mark-Monitor Evidence).

<sup>&</sup>lt;sup>40</sup> See id. at ¶¶ 32-34, 114, 119, 127, 157-58.

<sup>&</sup>lt;sup>41</sup> See id. at ¶¶ 36-39, 160-170.

## D. Dr. Feamster's expert opinion concerning contemporaneous downloads is relevant, reliable, and admissible.

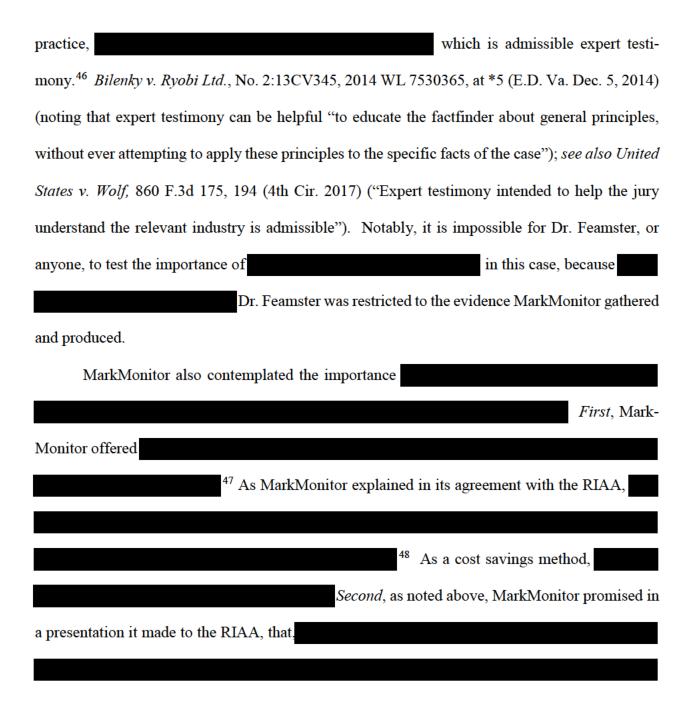


<sup>&</sup>lt;sup>42</sup> See Alvarez Decl., Ex. 2 (Feamster Rebuttal Rpt., ¶ 15); Ex. 3 (Frederiksen-Cross Rpt., ¶ 17).

<sup>&</sup>lt;sup>43</sup> Id., Ex. 3 (Frederiksen-Cross Rpt., ¶81).

<sup>&</sup>lt;sup>44</sup> Alvarez Decl., Ex. 2 (Feamster Rebuttal Rpt., ¶ 24).

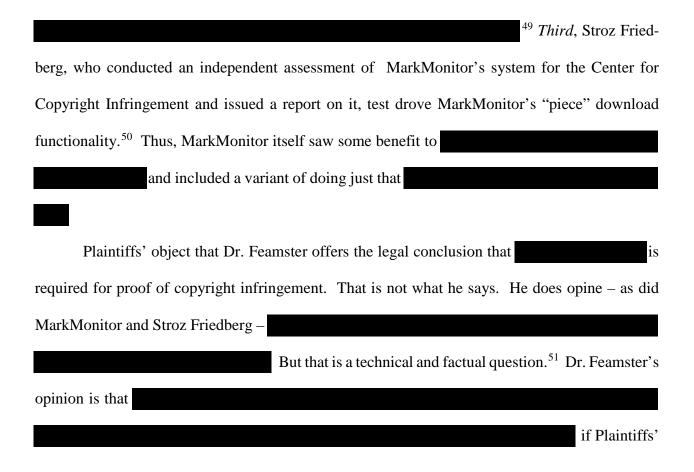
<sup>&</sup>lt;sup>45</sup> Alvarez Decl., Ex. 1 (Feamster CV);



<sup>&</sup>lt;sup>46</sup> Downloading full files from peers was a practice implemented by BMG. *BMG v. Cox*, 149 F. Supp. 3d 663 ("[plaintiff's agent] itself downloaded ... full copies of BMG's works using Cox's service").

<sup>&</sup>lt;sup>47</sup> See Alvarez Decl., Ex. 7 (2012 SOW, Appendix C).

<sup>48</sup> *Id.* at 10. Notably,



<sup>&</sup>lt;sup>49</sup> See Alvarez Decl., Ex. 9 (P2P Enforcement Process at 10, 13, 16, 18, 20). See also Ex. 7 (2012 SOW, RIAA 00000026, MarkMonitor

<sup>&</sup>lt;sup>50</sup> Alvarez Decl., Ex. 8 (Stroz Friedberg Independent Assessment, at 777, 779, 780, 786).

What needed to be downloaded to meet Plaintiffs' burden of proof as a matter of law is the subject of a pending summary judgment motion that addresses issues on which Dr. Feamster does not opine. *See*, Docket No. 328. For the reasons stated in that pleading, Plaintiffs misstate the requirements for proof of copyright infringement. Without a full-file download, Plaintiffs cannot prove that any portion of work was actually disseminated, as opposed to merely being "made available" by and Cox subscriber. *See*, *e.g.*, *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 983 (D. Ariz. 2008) ("Merely making an unauthorized copy of a copyrighted work available to the public does not violate a copyright holder's exclusive right of distribution."); *UMG Recordings, Inc. v. Hummer Winblad Venture Partners (In re Napster, Inc.*), 377 F. Supp. 2d 796, 802 (N.D. Cal. 2005) ("merely listing a copyrighted musical composition or sound recording in an index of available files falls short of satisfying these 'actual dissemination' or 'actual transfer' standards.")

direct infringement case survives summary judgment, it is information that the jury should be allowed to consider.<sup>52</sup>

#### III. CONCLUSION

Based on the foregoing, Cox respectfully requests the Court deny Plaintiffs' Motion to preclude certain expert testimony by Dr. Nick Feamster in its entirety.

Dated: September 24, 2019

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<sup>&</sup>lt;sup>52</sup> Plaintiffs' argument that Dr. Feamster should be precluded from testifying about is misguided. First, he raised it directly in response to a question from Plain-See Alvarez Decl., Ex. 4 (Feamster Dep., 280:21-282:3; 284:16-21). Second, bitfields are a part of BitTorrent. Dr. Feamster's opinion concerns By monitoring activity on BitTorrent, Plaintiffs have opened the door to an analysis on the Furthermore, the bitfield is See Alvarez Decl., Ex. 11 (Frederiksen-Cross Reply Rpt., ¶¶ 22, 31). Dr. Feamster should be able to testify as his testimony would allow the jury to understand habits on BitTorrent. See Bilenky v. Ryobi Ltd., No. 2:13CV345, 2014 WL 7530365, at \*5 (E.D. Va. Dec. 5, 2014) (noting that expert testimony can be helpful "to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case"). Third, Plaintiffs' challenge to Dr. Feamster's testimony goes to its weight instead of whether or not it was reliably analyzed. Lastly, Dr. Feamster cannot point to an instance of where As detailed above,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on September 24, 2019, the foregoing was filed and served electronically by the Court's CM/ECF system upon all registered users.

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